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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re A.M. et al., Persons Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

MARIA M. et al.,

Defendants and Appellants.

D056687

(Super. Ct. No. SJ11744B&E)

APPEAL from a judgment of the Superior Court of San Diego County, Gary M.
Bubis, Judge. Affirmed.

Gerardo M. appeals the judgment terminating his parental rights to his five-and-one-half-year-old daughter, Cassandra R., and the denial of his Welfare and Institutions

Code¹ section 388 petition, in which he sought to have Cassandra placed with paternal uncle and aunt F.R. and Rosa R. Gerardo contends that the San Diego County Health and Human Services Agency (the Agency) failed to give F.R. and Rosa a fair opportunity to have Cassandra placed with them, and that the court erred by declining to apply the beneficial relationship exception to termination of his parental rights (§ 366.26, subd. (c)(1)(B)(i)).

Maria M. appeals the judgment terminating her parental rights to her daughters, Cassandra and 11-year-old A.M. Maria contends that the court erred by declining to apply the beneficial relationship exception as to both girls.

We affirm the judgment.

I

BACKGROUND

In 2005 and 2006, the Agency opened voluntary cases after substantiating reports that Maria had physically abused her four-year-old son, Rodrigo M., and her eight-year-old daughter, Darlene M. In late 2006, the Agency received reports that Maria had physically abused seven-year-old A.M., and that she had neglected and emotionally abused all of her children—Darlene, who was almost nine years old at the time; seven-year-old A.M.; six-year-old Rodrigo; three-year-old Sergio N.; and two-year-old

¹ All further statutory references are to the Welfare and Institutions Code.

Cassandra.² In December, A.M. and Cassandra were detained in the foster home of Barbara C.

In January 2007, the Agency filed dependency petitions alleging that A.M. and Cassandra had been exposed to violent confrontations between Maria and Gerardo. Specifically, Maria lit Gerardo's pants on fire and grabbed his face forcefully in front of the children. Maria had hit Gerardo and scratched his face in the past.

Just before the petitions were filed, paternal uncle Jorge R. told the Agency that he and other paternal uncles were interested in obtaining custody of Cassandra if the court did not give Gerardo custody. F.R. and Rosa also expressed an interest in obtaining custody of Cassandra, and Gerardo said that he wanted Cassandra to be placed with F.R. and Rosa. In February 2007, F.R. and Rosa's "home was evaluated and all paperwork for home approval was completed and filed pending placement" ³ In April, the court entered true findings on the petitions. The court ordered A.M. placed with a nonrelative extended family member and ordered Cassandra placed with Gerardo.

In June 2007, the Agency filed a supplemental petition (§ 387) alleging that Gerardo had confronted Maria, engaged in a verbal confrontation with her and her male companion, and tried to engage the companion in a fight. Cassandra, who was present in Gerardo's car during the confrontation, began to cry. Gerardo put Maria in his car, took

² Gerardo is not the father of Darlene or A.M. Only A.M. and Cassandra are the subjects of these appeals, and Gerardo's appeal pertains only to Cassandra. It is not clear whether Gerardo is the father of either Rodrigo or Sergio.

³ The approval was not finalized at that time because Cassandra was placed with Gerardo soon after F.R. and Rosa's paperwork was completed.

Cassandra home, threatened Maria, choked her and pulled her hair. Gerardo was arrested, jailed for two weeks, and ultimately placed on probation. Gerardo called Barbara after he was incarcerated and asked her to take care of Cassandra. The court again detained Cassandra with Barbara. The court entered a true finding on the supplemental petition and ordered that Cassandra be placed in foster care. Cassandra was placed with paternal uncle and aunt Benjamin and Laura B. (together, the B.'s) in July, immediately after their home was approved.

In June 2007, A.M. and Darlene disclosed that Gerardo had sexually abused them. In July, A.M. was detained in a foster home. In August, the Agency filed a supplemental petition pertaining to A.M. The petition alleged that the nonrelative extended family member with whom A.M. had been placed before her detention was no longer able to care for A.M., due to financial difficulties. The court entered a true finding on the supplemental petition and ordered A.M. placed in foster care. However, by late August, the Agency had filed a licensing complaint against A.M.'s foster parent,⁴ and A.M. was moved to a new foster home.

In October 2007, the Agency filed subsequent petitions (§ 342) pertaining to A.M. and Cassandra. The petitions alleged that Gerardo had sexually abused A.M. and Darlene. In November, Gerardo was arrested and jailed, and the court entered a true finding on A.M.'s petition. In April 2008, the court entered a true finding on Cassandra's petition.

⁴ There were allegations that the foster mother consumed alcohol and did not adequately feed the children.

Three days before the court entered a true finding on Cassandra's subsequent petition, the B.'s asked the Agency to remove Cassandra from their home. The B.'s indicated that they did not believe that Gerardo had molested A.M. and Darlene, and were concerned that Maria might encourage Cassandra to accuse Benjamin or his sons of molestation. The B.'s told the Agency that there were no other family members available to care for Cassandra and suggested that she be placed with Barbara.

In May 2008, the Agency filed a supplemental petition alleging that the B.'s could no longer care for Cassandra. Cassandra was detained with Barbara. In June, Gerardo told the Agency that he wanted Cassandra to be returned to the B.'s. In September, the court entered a true finding on the supplemental petition and ordered Cassandra placed in foster care. In December, Gerardo told the Agency that both F.R. and Rosa, and the B.'s, wanted to adopt Cassandra. In early 2009, F.R. and Rosa and Barbara each informed the Agency that they wanted to adopt Cassandra. The social worker asked F.R. and Rosa why they had not come forward earlier. In response, F.R. and Rosa voiced their concern that Maria might tell Cassandra to claim that her uncles had touched her inappropriately.

In July 2008, A.M.'s foster mother informed the Agency that she was no longer willing to care for A.M. because A.M. was sometimes violent. The foster mother agreed to let A.M. remain with her if the Agency provided more services and A.M.'s behavior improved. In September, the foster mother reported that A.M. had become more violent and said that A.M. constantly threatened to hurt herself. Four days later, A.M. was moved to Maria's home. In December, the Agency learned that Maria had spanked A.M. with a slipper or tennis shoe after A.M. accidentally urinated on the bathroom floor.

Maria also grabbed A.M.'s arm, squeezed it and slapped her. Maria had previously hit A.M. and pulled her hair.

Maria said that she did not love A.M., that she resented her, and that she wanted A.M. removed from the home. The Agency filed a supplemental petition based on Maria's statements. A.M. was detained in a foster home. In March 2009, the court entered a true finding on the petition and ordered A.M. placed in foster care. The court terminated Maria's and Gerardo's services and set a section 366.26 hearing for A.M. and Cassandra.

On June 5, 2009, F.R. and Rosa applied to become Cassandra's de facto parents. The court denied the application. On June 9, Gerardo's counsel requested a special hearing on F.R.'s request that his home be evaluated for Cassandra's placement. At the special hearing on June 24, the court gave the Agency discretion to place Cassandra with relatives or with a nonrelative extended family member, but declined to order an evaluation of F.R. and Rosa's home. In August, the court ordered the Agency to assess "all appropriate relatives" for Cassandra's and A.M.'s placements.

On October 6, 2009, the date set for the section 366.26 hearing, Gerardo filed a section 388 petition. In his petition, Gerardo asked that Cassandra be detained "with her family" and placed with F.R. and Rosa. The petition also referred to unspecified paternal relatives who had requested placement and consideration as potential adoptive parents. At the hearing, Gerardo's counsel stated that paternal relatives would "take both children." The court ordered Gerardo to file a new petition "specifically requesting placement of both children in a particular home." The court also ordered that all

appropriate relatives be assessed. On October 27, the Agency resumed the approval process for F.R. and Rosa's home.

By November 4, 2009, Gerardo had filed a new section 388 petition. In the new petition, Gerardo requested that Cassandra be placed with F.R. and Rosa, and alleged that F.R. and Rosa "would also take [A.M.] into their care." On November 8, the Agency began A.M.'s transition into a prospective adoptive home. By November 22, A.M.'s transition into the prospective adoptive home was complete. On December 4, F.R. and Rosa's home was approved for placement. Also on December 4, the court denied Gerardo's new section 388 petition, and, in January 2010, the court terminated parental rights.

II

DISCUSSION

A

The Court Did Not Abuse Its Discretion In Denying Gerardo's Section 388 Petition

Section 388 allows the juvenile court to modify an order if a parent establishes, by a preponderance of the evidence, that there are changed circumstances or new evidence, and that the proposed change would promote the child's best interests. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) We review the denial of a section 388 petition for an abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

As changed circumstances or new evidence, Gerardo's section 388 petition alleged that his "family . . . ha[d] requested placement and/or consideration for adoption for the

minor since inception of the case" and that F.R. and Rosa had made "[n]umerous attempts to have the child placed with them." From the context, it is clear that the references to "the minor" and "the child" are to Cassandra.

The petition does not expressly allege any changed circumstances or new evidence as to A.M. In that regard, Gerardo now argues that there was new evidence that Cassandra and A.M. wanted to be together, and that F.R. wanted to provide a home for both girls. The evidence, however, is to the contrary. A.M. said that she would like to live with Cassandra, but also said that she did not want either one of them to have to live with F.R. and Rosa. Cassandra did not ask to be allowed to have contact with A.M.

As to Cassandra, F.R. and Rosa's requests for placement before the setting of the section 366.26 hearing did not constitute changed circumstances or new evidence. Further, assuming, only for the purpose of argument, that these requests did qualify as changed circumstances, Gerardo did not meet his burden to show that placement of Cassandra or A.M. with F.R. and Rosa would be in the girls' best interests. As to the girls' best interests, the petition alleged that "[t]he child would be with family who would keep her connected to her extended family" and that F.R. and Rosa "would also take the sibling of Cassandra into their care."

F.R. and Rosa had no contact with Cassandra before she entered the dependency system. Their only contact with Cassandra occurred during visits that commenced only

after this case was pending.⁵ Cassandra was reluctant to attend the visits. Cassandra's placement with F.R. and Rosa would have required that she be removed from Barbara's home, where she was detained in June 2007 in conformance with Gerardo's wishes, and again in May 2008. Those detentions lasted for approximately three months and two and one-half months, respectively. By the time of the section 388 hearing in December 2009, Cassandra had lived with Barbara for one and one-half years. Thus, Cassandra had been in Barbara's stable, loving home for a total of more than two years. Cassandra regarded Barbara and Barbara's husband as her parents, and was happy living with them.

F.R. and Rosa did not request that A.M. be placed in their home until July 2009. Placement with F.R. and Rosa would have required that A.M. be removed from her prospective adoptive family. That family met A.M.'s needs and she was thriving in their home. The family was helping A.M. cope with the loss, rejection, and trauma she had suffered as a result of Gerardo's molestation. The social worker believed that placement with F.R. and Rosa would remind A.M. of the molestation and cause her to regress therapeutically.⁶ Further, F.R. and Rosa were virtual strangers to A.M. and knew nothing about her needs. F.R. testified that he had met A.M. but admitted that he did not

⁵ Although F.R. testified that he attended hearings regularly, the record reflects that he did not begin attending hearings until early 2009. He attended no more than nine of the 54 hearings that were held in this case.

⁶ When A.M. saw F.R. and Rosa in the courthouse lobby in December 2009, she said, "I don't like those people. They make me nervous." A.M. then ran away crying. When the social worker told A.M. that F.R. and Rosa wanted to adopt her, A.M. cried and said, "No, how could they adopt me? I don't want them to adopt my sister Cassandra. I don't want them to adopt me. They don't believe things that happened to me."

know her. F.R. and Rosa never requested visits with A.M. By the time of the section 388 hearing, it had been at least two years since F.R. and Rosa had seen A.M.

The social worker testified that it would be detrimental to both A.M. and Cassandra to be placed with F.R. and Rosa because F.R. and Rosa did not believe that Gerardo had molested A.M. and Darlene. F.R. had told the social worker that he did not believe that Gerardo had molested A.M. and Darlene. Specifically, F.R. had stated that there was no proof that Gerardo had committed the molestations, but only the girls' reports, and that Gerardo had pleaded guilty only to avoid a life sentence. In the social worker's view, F.R. and Rosa's failure to believe that Gerardo had molested A.M. and Darlene rendered F.R. and Rosa unable to protect A.M. and Cassandra.⁷

Based on all of the evidence presented, the juvenile court could reasonably have concluded that it would not be in Cassandra's or A.M.'s best interests to grant Gerardo's section 388 petition. We therefore conclude that the court did not abuse its discretion in denying the petition.

B

The Relative Placement Preference was Inapplicable

Gerardo contends that he was prejudiced by the Agency's failure to give F.R. and Rosa a fair opportunity for Cassandra to be placed with them, which he maintains was required pursuant to the relative placement preference (§ 361.3). Section 361.3 gives "preferential consideration" to placement requests by certain relatives upon the child's

⁷ At the section 388 hearing, F.R. testified that because Gerardo had pleaded guilty to molestation, F.R. now believed that Gerardo was guilty.

removal from the parents' physical custody at the dispositional hearing.⁸ (§ 361.3, (a), (c)); *Lauren R.*, *supra*, 148 Cal.App.4th at p. 854.) The relative placement preference also applies "[s]ubsequent to the [dispositional] hearing . . . whenever a new placement of the child must be made." (§ 361.3, subd. (d); *Lauren R.*, *supra*, at p. 854.) The preference applies to temporary placements, not to adoptive placements. (*Lauren R.*, *supra*, at pp. 845, 853.)

In 2007, F.R. and Rosa requested that Cassandra be placed with them.⁹ This request became moot because Cassandra was placed with Gerardo at that time. F.R. and Rosa did not ask for placement while Cassandra was placed with the B.'s. Although, according to the social worker, F.R. and Rosa knew that Cassandra was going to be removed from the B.'s' home,¹⁰ F.R. and Rosa did not ask for placement at that time.¹¹ After Cassandra was removed from the B.'s' home, Gerardo said that he wanted Cassandra returned to the B.'s, but did not mention F.R. and Rosa. At the time that they

⁸ " 'Preferential consideration' means that the relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, (c)(1).) "Section 361.3 does not create an evidentiary presumption that relative placement is in a child's best interests." (*In re Lauren R.* (2007) 148 Cal.App.4th 841, 855 (*Lauren R.*)) Thus, even if the preference applied here, it would not support Gerardo's proposal that the case be remanded with directions to order the children's transition into F.R. and Rosa's home within six months.

⁹ F.R. and Rosa made this request only because Gerardo asked them to do so.

¹⁰ F.R. testified that Benjamin did not tell him that he was requesting Cassandra's removal.

¹¹ F.R. testified that he believed that because he had already asked for placement, Cassandra would be placed with him or that he would be considered for placement. He also believed that Barbara would take good care of Cassandra.

requested that Cassandra be removed from their home, the B.'s told the Agency that there were no other family members available to care for Cassandra.¹² F.R. and Rosa did not mention placement again until February 2009, shortly before the court terminated Maria's and Gerardo's services, and after Cassandra had been living with Barbara for more than nine months.

The relative placement preference did not apply at the hearing on Gerardo's section 388 petition because no new placement was necessary. The only placement that was under consideration at the time was an adoptive placement, not a temporary one.¹³ (*Lauren R.*, *supra*, at pp. 845, 853.) Because Gerardo's and Maria's services had been terminated months earlier, the focus was on Cassandra's need for permanency and stability, and there was a rebuttable presumption that it was in her best interests to remain in her existing placement. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) "The

¹² Gerardo contends that the Agency unfairly treated the three paternal uncles—F.R., Benjamin and Jorge—as a single entity. In fact, the uncles acted as a group and spoke for each other. For example, they agreed among themselves that F.R.'s home would be the best placement for Cassandra, followed by Benjamin's home, with Jorge's home the last choice.

¹³ Even if the relative preference did apply, Cassandra's best interests would still be the ultimate issue, just as her best interests are the ultimate issue under section 388. (*Lauren R.*, *supra*, 148 Cal.App.4th at p. 855.) As discussed above, the court could reasonably have concluded that it was not in Cassandra's best interests to be removed from her placement with Barbara.

Gerardo cites *In re Joseph T.* (2008) 163 Cal.App.4th 787, in which the court held that the relative placement preference applies "at least throughout the reunification period" (*id.* at p. 794) even if a new placement is not required (*id.* at p. 797). This holding is inconsistent with section 361.3, which provides that the preference applies after disposition "whenever a new placement of the child must be made." (§ 361.3, subd. (d).) Further, even if the holding in *Joseph T.* is correct, the case is distinguishable because there the court had not terminated services. (*Joseph T.*, at pp. 791-793.)

overriding concern of dependency proceedings . . . is not the interest of extended family members but the interest of the child. '[R]egardless of the relative placement preference, the fundamental duty of the court is to assure the best interests of the child, whose bond with a foster parent may require that placement with a relative be rejected.' [*In re Stephanie M.*, *supra*, at p. 321.] The passage of time is a significant factor in a child's life; the longer a successful placement continues, the more important the child's need for continuity and stability becomes in the evaluation of her best interests. (*Id.* at p. 319.)" (*Lauren R.*, *supra*, at p. 855.) The child's "best interests have to prevail over all other considerations"—even bureaucratic delays that are not the fault of a relative who requests placements. (*In re Lauren Z.* (2008) 158 Cal.App.4th 1102, 1112.)¹⁴

C

The Court Did Not Err In Refusing to Apply The Beneficial Relationship Exception To Termination of Gerardo's Parental Rights

If a dependent child is adoptable,¹⁵ the juvenile court must terminate parental rights at the section 366.26 hearing unless the parent proves the existence of a statutory exception. (§ 366.26, subd. (c)(1); *In re Helen W.* (2007) 150 Cal.App.4th 71, 80.) One such exception exists if "[t]he parent [has] maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd.

¹⁴ In light of our conclusion that section 361.3 did not apply, we need not address Gerardo's assertion that the court should have conducted an independent review of the Agency's failure to give preference to placement with F.R. and Rosa.

¹⁵ Gerardo does not contest the juvenile court's finding that Cassandra was adoptable.

(c)(1)(B)(i).) A beneficial relationship is one that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*)). The existence of this relationship is determined by taking into consideration "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs" (*Id.* at p. 576.) Examining the evidence in the light most favorable to the judgment, we conclude that there is substantial evidence to support the court's findings that "[n]one of the circumstances listed in [section] 366.26[, subdivision] (c)(1) exist in this case." (*Id.* at pp. 576-577; *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373.)¹⁶

Cassandra was detained when she was two years old. She was placed with Gerardo, but was removed after two months. At the time of the section 366.26 hearing, Cassandra was five and one-half years old. As mentioned above, she had been out of Gerardo's care, and living with Barbara, for more than one and one-half years continuously, and for a total of more than two years over the course of this case.

¹⁶ The court did not make an express finding as to whether Gerardo had maintained regular visitation and contact with Cassandra.

Since Cassandra's removal from Gerardo's home in June 2007, there had been few visits because Gerardo was incarcerated; Barbara would not take Cassandra to visit him; paternal relatives were reluctant to transport Cassandra; and Gerardo had not returned an application required by the prison for the social worker to be permitted to be present at visits. Additionally, Cassandra was uncomfortable visiting Gerardo in prison, and he agreed to postpone visitation until she became comfortable.

Gerardo sent letters to Cassandra. In a June 2009 letter, Gerardo referred to "people who want to separate us" and stated, "when I get out of here, I am going to look for you . . . and we are going to be together."

Even if the above facts are construed as establishing regular visitation and contact, Gerardo did not meet his burden to show the existence of a beneficial relationship.

Cassandra regarded Barbara and Barbara's husband as her parents and was happy in their loving and stable home. There was no evidence that Cassandra shared a strong bond with Gerardo, who was in prison for molesting her half sisters.

There is substantial evidence to support the conclusions that Cassandra did not have "a substantial, positive emotional attachment" to Gerardo of the kind that would outweigh the well-being that she would gain in a permanent, adoptive home, and that Cassandra would not be greatly harmed by the severance of the relationship. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) There is thus substantial evidence to support the court's finding that the beneficial relationship exception does not apply.

D

Maria Forfeited Her Right to Challenge The Court's Refusal to Apply The Beneficial Relationship Exception

At the section 366.26 hearing, Maria's counsel stated: "[Maria] has decided to make an unselfish move at this point and submit; however, . . . [Maria] has attempted several times throughout the history of the case to create a mother-daughter relationship with both [A.M.] and Cassandra. [¶] There is no doubt that [Maria] loves [A.M. and Cassandra] and would love to have them with her, but she understands that in their best interests the children are happy. [Sic.] Her biggest concern is to continue a relationship with her daughters, and it's our hope that the current caretakers would allow [Maria] to continue seeing her daughters. [¶] With that we would submit."

When a parent submits on the Agency's recommendation, she "endorses the court's issuance of the recommended findings and orders" (*In re Richard K.* (1994) 25

Cal.App.4th 580, 589), and thereby forfeits her right to complain of those findings and orders on appeal. (*Id.* at p. 590.) When, on the other hand, the parent submits on the Agency's report, no forfeiture results. (*Id.* at p. 589; *In re Ricardo L.* (2003) 109 Cal.App.4th 552, 565.) A submission on the report is an agreement to the court's consideration of the information in the report as the only evidence, "permitting the court to decide an issue on a limited and uncontested record" (*In re Richard K., supra*, at p. 589.)

The Agency recommended that parental rights be terminated and that A.M. and Cassandra be adopted by their current caretakers. It is clear from the statement of Maria's counsel that Maria was submitting on that recommendation, since counsel's statement envisions, and accepts, that A.M. and Cassandra would remain with their caretakers, who would have the power to prohibit contact with Maria, despite her wish for contact. This acceptance is inconsistent with any assertion of an exception to the termination of parental rights. Because Maria submitted on the Agency's recommendation, she cannot

now assert that the beneficial relationship exception to adoption applies to prevent termination of her parental rights.¹⁷

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

McINTYRE, Acting P. J.

O'ROURKE, J.

¹⁷ Even if Maria were permitted to assert the beneficial relationship exception, the evidence clearly establishes that she would not prevail on the merits. With respect to visitation, Maria was allowed unsupervised visitation with both girls during part of the case, and her visitation was consistent. In addition, A.M. lived with Maria for a time while this case was pending. However, during that time, Maria physically and emotionally abused A.M.

As to the girls' best interests, A.M. was not quite eight years old when she was detained, and was 11 years old at the time of the section 366.26 hearing. A.M.'s therapist reported that since A.M.'s move to the prospective adoptive home, she had made remarkable improvement. Cassandra, who was five and one-half years old at the time of the hearing, had lived with Barbara for more than one and one-half years and had not lived with Maria for more than three years. Cassandra was securely attached to Barbara and her husband, and was thriving in their home. Although A.M. and Cassandra loved Maria, the evidence showed that neither A.M. nor Cassandra had "a substantial, positive emotional attachment" to Maria of the kind that would outweigh the well-being that the girls would gain in permanent, adoptive homes, and there was no indication that A.M. or Cassandra would be greatly harmed by the severance of their relationships with Maria. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)